

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

EVERYMARKET INC,)	Case No.
3483 Pleasant Ridge Road,)	
Wingdale, NY 12594,)	
XIAOWEI KANG,)	COMPLAINT
115 Dover Furnace Road, Dover Plains,)	
NY 12522)	
Plaintiff-petitioner,)	
)	
vs.)	
)	
JEFF SESSIONS, Attorney General of)	
the United States, U.S. Department of)	
Justice, 950 Pennsylvania Avenue, NW,)	
Washington, D.C. 20530; KIRSTJEN)	
NIELSEN, Secretary, Department of)	
Homeland Security, 425 I Street,)	
Washington, D.C. 20536; L. FRANCIS)	
CISSNA, Director, U.S. Citizenship and)	
Immigration Services, 20 Massachusetts)	
Avenue, NW, Washington, DC 20529,)	
KATHY BARAN, Director, California		
Service Center, U.S. Citizenship and		
Immigration Services, 24000 Avila Road,		
Laguna Niguel, California 92677.		

Defendants-respondents.

COMPLAINT

I. INTRODUCTION

1. This is an action brought pursuant to Section 10b of the Administrative

Procedure Act, 5 U.S.C. § 702, et. Seq., seeking to hold unlawful and set aside the decision of the California Service Center (CSC) Director of the United States Citizenship and Immigration Services (USCIS) in File No. WAC1810151251 on April 16, 2018, denying EveryMarket, Inc.'s (EveryMarket)'s Form I-129, Petition for Nonimmigrant Worker on behalf of Xiaowei Kang on USCIS' legally erroneous conclusion that the job of Supply Chain Engineer offered to him is not a specialty occupation despite the fact that it is undisputed that most supply chain engineers have a bachelor's degree in an engineering-related field, and both the courts and USCIS itself have repeatedly held that where most persons in an occupation require a bachelor's degree in a narrow range of majors, or a related major, or its equivalent, it is a specialty occupation.

2. This action also asks the Court to hold unlawful and set aside the Director's denial of Xiaowei's application to change his nonimmigrant status in the United States (same date and file number as above), which was denied solely because of the erroneous denial of Everymarket's petition on his behalf.

II. PLAINTIFF

3. Xiaowei Kang is a native and citizen of China who holds a Bachelor of Science Degree in Mechanical Engineering and Automation from Kunming University

of Science and Technology in China. Xiaowei Kang earned a single foreign degree that is fully equivalent to a four-year U.S. Bachelor of Science degree in Mechanical Engineering from a regionally accredited college or university in the United States.

4. EveryMarket, Inc. is a U.S. based company and online retailer committed to becoming the most loved and trusted marketplace on the web and petitioned for Mr. Kang's H-1B status.

III. DEFENDANTS

5. Defendant, Jeff Sessions, is sued in his official capacity as the United States Attorney General. As Attorney General, Mr. Sessions is responsible for the administration and enforcement of the immigration laws of the United States.
6. Defendant, Kirstjen Nielsen, is sued in her official capacity as Secretary of Department of Homeland Security ("DHS"). As Secretary of DHS, Mr. Nielsen is responsible for the administration and enforcement of the immigration laws of the United States.
7. Defendant, L. Francis Cissna, is sued in his official capacity as Director of the United States Citizenship and Immigration Services ("USCIS"). As Director of USCIS, Mr. Cissna is responsible for the overall administration of USCIS and the implementation of the immigration laws of the United States.

8. Defendant, Kathy Baran, is sued in her official capacity as Director of the USCIS California Service Center. As Director of the California Service Center, Ms. Baran is responsible for the overall administration of the USCIS California Service Center and the decisions that are issued.

IV. JURISDICTION AND VENUE

9. This action arises under the Immigration and Nationality Act of 1952 ("INA"), 8 U.S.C. § 1101. This Court has jurisdiction over this action under 28 U.S.C. § 1331 (federal question) and the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*
10. The Court also has jurisdiction over this matter pursuant to 28 U.S.C. § 1331. *See Califano v. Sanders*, 430 U.S. 99, 105 (1977) (except where statutes preclude review, 28 U.S.C. § 1331 “confer[s] jurisdiction on federal courts to review agency action”). See also, 5 U.S.C. § 702; 28 U.S.C. § 1361; 28 U.S.C. §§ 2201-2202.
11. Because Defendants’ decision on a petition for H-1B visa status is not discretionary, neither the immigration laws (see, e.g., 8 U.S.C. § 1252(a)(2)(B)(ii)) nor the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.* (the “APA”) withdraws jurisdiction. *See, e.g., Spencer Enterprises, Inc. et al v. United States*, 345 F.3d 683 (9th Cir. 2003).

12. Venue is proper in the District of Columbia under 28 U.S.C. § 1391(e) because Defendants reside in this judicial district.

V. STANDING

13.(1) Mr. Kang likewise has a legally protected interest in a decision by the USCIS on EveryMarket's petition on his behalf which is not arbitrary and capricious, nor an abuse of discretion, and which is in accordance with law, per 5 U.S.C. 9 706(2), and this right has been invaded inasmuch as because of the improper denial of this petition his change of status has also been denied. The invasion of this right has caused him concrete and particularized injury in that as a result of this invasion he cannot commence employment with EveryMarket and so cannot derive the revenue he anticipated from this employment; (2) there is a causal connection between the injury-in-fact and the Defendants' challenged behavior in that it is precisely the Defendants' denial of EveryMarket's petition and the application for change of status which prevents Mr. Kang from working for EveryMarket and (3) it is certain that the injury-in-fact will be redressed by a favorable ruling in that such a ruling will enable EveryMarket to employ Mr. Kang and so enable him to support himself. Further, EveryMarket wishes to employ Mr. Kang in the offered position for several reasons – EveryMarket believes that Mr. Kang has a wealth of

experience of the supplier field in China as a result of four years' experience in China, such that major future projects will be interrupted without Mr. Kang's employment, resulting in major loss of time and capital, as well as plans for a factory built in the U.S. Accordingly, Mr. Kang and EveryMarket have standing to complain of this action. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (U.S. 1992), *supra*.

VI. FACTUAL BACKGROUND

14. On February 20, 2018, EveryMarket submitted the instant H-1B Petition on behalf of Mr. Kang with USCIS seeking to classify him as a temporary worker in a specialty occupation (H-1B) under Section 101(a)(15)(H(i)(b) of the INA with a concurrent request for change of status from his F-1 status. A complete copy of that Petition with all evidence filed with it is attached as Exhibit A.

15. According to the terms of the Petition, EveryMarket sought Mr. Kang's services as a Supply Chain Engineer, as well as to perform a role with Olivet University. In connection with his role as Supply Chain Engineer, Mr. Kang would for a temporary period perform the following job duties:

16. In his role as Supply Chain Engineer for EveryMarket directly, Mr. Kang would perform the following temporary duties:

- ◆ Lead supply chain operations and strategy throughout the region, applying

knowledge of Six Sigma methodology, Lean philosophy, and Just-in-time inventory management techniques to create and implement cost saving initiatives

- ◆ Manage teams across sourcing, production, logistics, warehousing, distribution, and customer service divisions and coordinate with all departments to facilitate optimization of all business operations within the entire company
- ◆ Create quarterly performance and cost-tracking reports; present results and make recommendations for improved systems, procedures, and/or products to management
- ◆ Create and manage vendor relationships and negotiate new contracts that will increase profits through reduced costs and increased revenues
- ◆ Analyze existing business operations and financial data to track and reduce budget and operational costs from production through distribution
- ◆ Research product development in the industry and analyze marketing data, pricing, and retail trends to create new product opportunities to increase customer satisfaction
- ◆ Track low-level and high-level key performance indicators (KPIs) to monitor service levels and costs, creating and implementing strategies to ensure that EveryMarket meets its business objectives

See Exhibit A.

17. In his temporary role with Olivet University, Mr. Kang's proposed job duties would include the following:

- ◆ Serve as academic advisor to engineering students
- ◆ Train students on strategies for reducing costs and increasing revenues for a variety of business types
- ◆ Train and educate students on the following:
 - Supply chain operations
 - Analyzing business operations and financial data to reduce costs
 - Coordinating with all departments of an organization to improve

business operations

- Creating new product opportunities
- Tracking KPIs
- Creating performance and cost-tracking reports to present to management

See Exhibit A.

18. Subsequently, the USCIS sent EveryMarket a Request for Evidence (“RFE”) dated March 7, 2018, and EveryMarket timely responded to the RFE on March 30, 2018. See Exhibit B, Copy of RFE and Response. EveryMarket dutifully responded to the RFE and addressed three separate issues, one pertaining to the ultimate basis for denial – evidence pertaining to the proffered position as a specialty occupation. In Response, EveryMarket offered the following explanations:

- ◆ According to the Occupational Outlook handbook, “Industrial engineers must have a bachelor’s degree...many industrial engineers have degrees in mechanical engineering...” The beneficiary holds a bachelor’s degree in Mechanical Engineering and Automation. See Exhibit B. *In Raj and Co. v. USCIS*, 85 F. Supp 3d 1241 (2015), the court notes the fallacy in the USCIS interpretation of the OOH provided in the instant Request for Evidence that “Defendant’s approach impermissibly narrows the plain language of the statute. The first regulatory criterion does not restrict qualifying occupations to those for which there exists a single, specifically tailored and titled degree program”.
- ◆ The Supply Chain Engineer will supervise four direct reports: the Product Manager Assistant, the Buyer, the Inventory Management Assistant, and the Assistant Category Manager. All of the employees who report to the Supply

Chain Engineer have a bachelor's degree as well as a Master of Business Administration degree. Without having at least a bachelor's degree, the Supply Chain Engineer would not be qualified to supervise employees who possess Masters degrees. Therefore, EveryMarket requires its Supply Chain Engineer to possess at least a bachelor's degree in Mechanical Engineering, Manufacturing Engineering, or a closely related field in order to perform the duties of the position.

See Exhibit B.

19. Mr. Kang's proposed job duties were explained yet further in a supplemental support letter from EveryMarket, which confirmed that the employer normally requires a degree for the Supply Chain Engineer, as well as confirming that the specific duties of its Supply Chain Engineer are so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

20. The new letter from EveryMarket also provided a more detailed description of the duties of the position, the skills required to perform them, the fact that the Supply Chain Engineer must have advanced knowledge of probability theory, statistical methods and mathematical calculations in order to develop cost analysis in order to develop cost analysis systems and create quarterly performance and cost-tracking reports, and in-depth knowledge of management, project management, and economics in order to facilitate optimization of all business operations across sourcing production, logistics, warehousing,

distribution, and customer service divisions.

21. Nevertheless, on April 16, 2018 USCIS, acting through Kathy A. Baran, Director of its California Service Center, issued its Decision denying EveryMarket's H-1B Petition on behalf of Mr. Kang. See Exhibit C, Copy of Decision.

22. The stated basis for the Decision was EveryMarket did not meet "any of the four criteria enumerated at 8 CFR § 214.2(h)(4)(iii)(A)...[and] have not shown that the proffered position is a specialty occupation". Id.

23. On the same date USCIS denied Mr. Kang's application for change of status because EveryMarket's petition on his behalf was also denied. Id.

VII. CAUSE OF ACTION

24. 5 U.S.C. § 706 provides in material part that:

To the extent necessary to issue a decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

25. The USCIS' Decision of April 16, 2018 denying EveryMarket's H-1B petition

on behalf of Mr. Kang was arbitrary, capricious and not in accordance with law inasmuch as:

(b) The conclusion that EveryMarket had “not shown that the proffered position is a specialty occupation” was likewise arbitrary and capricious inasmuch as it was unsupported by substantial (or in fact any) evidence as well as not in accordance with law inasmuch as it is inconsistent with USCIS Regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) as interpreted in *Next Generation Tech., Inc. v. Johnson*, No. 15 cv 5663 (DF), 2017 U.S. Dist. LEXIS 165531, at *30-31 (S.D.N.Y. Sep. 21, 2017) and at least 2,415 decisions of the USCIS, all of which stand for the proposition that an occupation is a “specialty occupation” if “most” of the members of that occupation hold a degree in a specialized field or related field, and it is undisputed that most industrial engineers do hold such degrees.

26. Further, inasmuch as Mr. Kang’s application for a change of status was denied solely because EveryMarket’s petition on his behalf was denied, the denial of that change of status was arbitrary and capricious and not in accordance with law as well.

27. 8 CFR 214.2(h)(4)(iii)(A) provides in relevant part that:

Criteria for H-1B petitions involving a specialty occupation – (A) Standards for

specialty occupation position. To qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

28. The Decision indicates that:

USCIS recognizes the *Occupational Outlook Handbook* (OOH), a publication of the U.S. Department of Labor (DOL), as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses... As shown in the OOH, although a bachelor's level of training is needed the position of Industrial Engineer is an occupation that does not require a baccalaureate level of education in a specific specialty as a normal, minimum for entry into the occupation. Many industrial engineers have degrees in one of engineering subspecialties, such as mechanical engineering, electrical engineering, manufacturing engineering, industrial engineering technology, or general engineering and it is not limited to a specific specialty.

29. However, the OOH actually provides that "Industrial engineers need a

bachelor's degree, typically in industrial engineering. However, many industrial engineers have degrees in mechanical engineering, electrical engineering, manufacturing engineering, industrial engineering technology, or general engineering. <https://www.bls.gov/ooh/architecture-and-engineering/industrial-engineers.htm>

30. If Industrial Engineers need a bachelor's degree typically in industrial

engineering and "many" Industrial Engineers have a bachelor's degree in a related engineering field, then it follows that this qualification is "normally"

required for this position and so the job qualifies as a specialty occupation. See *Next Generation Tech., Inc. v. Johnson*, No. 15 cv 5663 (DF), 2017 U.S. Dist. LEXIS 165531, at *30-31 (S.D.N.Y. Sep. 29, 2017).

31. This reasoning is consistent with that of the USCIS' Administrative Appeals Office, which has stated in at least 131 different unpublished decisions, that "USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations."¹ E.g. (Identifying Information Redacted By Agency) 2012 WL 4713226 (AAO February 8, 2012). However, the OOH provides that "[m]ost accountant and auditor positions require at least a bachelor's degree in accounting or a related field." (emphasis added). The OOH also states that "[m]ost computer and information research scientists need a Ph.D. in computer science or a related subject, such as computer engineering." (emphasis added).

32. As these cases also illustrate, "[i]n general, provided the specialties are closely related, e.g., statistics and math, a minimum of a bachelor's degree or higher degree in more than one specialty is recognized as satisfying the 'degree in the specific specialty' requirement of Section

¹ Extracted from Lexis' library of unpublished AAO and BIA decisions to retrieve 131 decisions containing this paragraph. See Exhibit D. The first of these decisions is attached as Exhibit E.

214(i)(1)(8) of the Act. In such a case, the required ‘body of highly specialized knowledge’ would essentially be the same”. Matter of (Name Redacted), (AAO March 12, 2017).²

33. Further, at least two published decisions of the Immigration and Naturalization Service have held that occupations which required at least a bachelor’s degree in a certain subject or a related field qualify as a member of the professions. *Matter of Doultsinos*, 12 I&N Dec. (DD 1967), *Matter of Rabbani*, 12 I&N Dec. 15 (DD 1966).

34. These decisions are binding upon all Service employees in the administration of the Immigration and Nationality Act. 8 C.F.R. § 103.3(c).

35. “The clearest common denominator for professional standing is at least a baccalaureate degree awarded for academic study in a specific discipline or narrow range of disciplines. This requirement is explained in numerous Immigration and Naturalization Service precedent decisions dating back to 1966. E.g., *Matter of Portugues Do Atlantico Information Bureau, Inc.*, Interim Decision 2982 (Comm.1984); *Matter of Ahmed*, 12 I & N Dec. 498 (R.C.1967); *Matter of Palanky*, 12 I & N Dec. 66

² Available online at https://www.uscis.gov/sites/default/files/err/D2%20-%20Temporary%20Worker%20in%20a%20Specialty%20Occupation%20or%20Fashion%20Model%20%28H-1B%29/Decisions_Issued_in_2017/MAR212017_01D2101.pdf

(R.C.1966); *Matter of Shin*, 11 I & N Dec. 686 (D.D. 1966).” *Matter of Caron International, Inc.*, 19 I. & N. Dec. 791, 793 (AAO 1988).

36. The USCIS has interpreted the term “specialty occupation” in the INA to be “nothing more than a carry-over” from the pre-1990 Act term, “member of the professions”, Memorandum of Jacquelyn Bednarz, August 26, 1993, reprinted in 70 No. 41 Interpreter Releases 1411.³ See also (Identifying Information Redacted by Agency), 2012 WL 4713221 nt4 (AAO, February 7, 2012).

37. The requirement that the degree must be in a specific academic major or have a specific title has been explicitly rejected by at least two United States District Courts and affirmed by none. The California Service Center denied an H-1B petition for a Market Research Analyst, finding that the OOH “...does not indicate that the degrees held by such workers must be in a specific specialty that is directly related to market research....” *In Re: Residential Finance Corporation*, WAC1121555179 (CSC, November 11, 2011). In reversing the CSC and directing approval of the petition, the court said this:

Defendant argues that Plaintiff is attempting to read out of the statutory and regulation requirements the “specific specialty” component. But Defendant’s approach is too narrow....Defendants implicit premise that the title of a field of study controls ignores the realities of the statutory language involved and the obvious intent behind them. The knowledge and not the title of the degree is what is important. Diplomas rarely come bearing occupation-specific majors.

³ Exhibit F

What is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge. *See Tapis Int'l v. I.N.S.*, 94 F. Supp. 2d 172, 175-176 (D. Mass. 2000) (rejecting agency interpretation because it would preclude any position from satisfying the “specialty occupation” requirements where a specific degree is not available in that field). *Residential Fin. Corp. v. United States Citizenship and Immigration Servs.*, 839 F. Supp. 2d 985, 996 (S.D. Ohio 2012).

38. Therefore, the “body of highly specialized knowledge” which must be applied theoretically and practically in the performance of the duties of the occupation must by necessity be directly related to the duties of the occupation, that is, “the specific specialty”. The source of that knowledge, however, may originate in different fields or disciplines, or a combination of fields or disciplines, including those in a “related field”. Whatever the field named in the degree, the inquiry must go to the substance of the knowledge learned, the attainment of which is usually memorialized by the conferral of a degree.

39. Accordingly, inasmuch as the OOH, which the USCIS itself treats as an authoritative source, finds that “industrial engineers need a bachelor's degree, typically in industrial engineering” and many industrial engineers have a bachelor’s degree in an engineering related field; therefore the USCIS did not act in accordance with law in finding it not to be a specialty occupation.

40.5 U.S.C. § 706(2) provides that a court may “hold unlawful and set aside

agency action, findings, and conclusions found to be---

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court hold unlawful and set aside the decisions denying EveryMarket's petition for nonimmigrant worker on Mr. Kang's behalf and Mr. Kang's application for change of status on the grounds that they were both arbitrary and capricious and not in accordance with law;

RESPECTFULLY SUBMITTED this 1st day of June, 2018.

KUCK BAXTER IMMIGRATION LLC,

/s/ Charles H. Kuck

Charles H. Kuck

GA Bar Number: 429940

Danielle M. Claffey

GA Bar Number: 222292

365 Northridge Road, Suite 300

Atlanta, GA 30350

Phone: 404-816-8611

Fax: 404-816-8615

QUARLES & BRADY LLP

/s/ Peter F. Asaad
DC Bar Number: 483977
1701 Pennsylvania Ave NW
Suite 700
Washington, DC 20006
Phone: 202-372-9522
Fax: 202-372-9585